

D. The Commission Should Exempt Local Origination Programming

The Notice suggests that a closed captioning requirement may be burdensome for particular local programming, such as locally produced college or high school sports.⁴⁴ We agree that captioning these types of local productions would be extremely costly and logistically difficult.

But these realities obtain for all local origination ("LO") programming shown on cable systems. As a consequence, such programming should be exempt from any mandatory requirements. LO services typically operate on very low budgets. The annual production budget can range from between \$100,000 to under \$500,000,⁴⁵ although many LO operations -- particularly those for smaller systems -- have considerably smaller budgets. Even assuming a \$100,000 budget, the average cost per hour (assuming 100 hours of LO programming each month) would be under \$100.⁴⁶ Captioning costs would far exceed the budgets for the typical LO production. Many local origination channels operate at a loss, and are voluntarily provided as a community service with little or no advertiser support.

Typical LO fare would be extremely expensive to caption, and imposing such a requirement would sound the death knell for this programming. A local origination channel may present unscripted, live interviews with local personalities, local sporting events, local charity

⁴⁴ Id. at ¶84.

⁴⁵ Based on 1996 Local Programming Survey Results (Dec. 1996).

⁴⁶ As the Commission previously recognized, "for less expensive programming, such as local cable originations, the cost of captioning could be a significant proportion of total expenditures." Captioning Report at ¶16.

“cablethons”, parades, and variety shows that include on-location taped interviews. These shows often air live, or, if taped, are quickly brought to air.

The Commission should not put cable operators to the choice of captioning this programming or not airing it at all. Instead, the Commission should carve out an exemption for all cable local origination programming, in order to encourage the continuation of this service to communities. This type of exemption would be entirely consistent with congressional intent. The House Report makes clear that the Commission should take into account in fashioning exemptions the cost of the captioning, considering whether the program is locally or regionally produced and distributed.⁴⁷

E. The Commission Should Exempt PEG Programming

Similarly, the Commission should exempt public, educational, and governmental (PEG) access programming from captioning requirements. PEG programming is non-commercial in nature and also operates on small budgets.⁴⁸ The costs of captioning could overwhelm these operations, leading to a diminution in service for the entire community.

F. The Commission Should Exempt Commercials From Mandatory Captioning

The Notice seeks comments on whether its rules should require some or all advertising to be captioned.⁴⁹ As the Notice recognizes, many national advertisers already caption their commercials. We agree that there appears to be a market incentive for advertisers to provide

⁴⁷ House Report at 115.

⁴⁸ Notice at ¶74.

⁴⁹ Id. at ¶77.

captioning where the costs of doing so are not prohibitive. For this reason, we do not believe that the Commission should mandate any captioning requirements for advertising.⁵⁰

To the extent the Commission nevertheless does impose captioning requirements, they should fall on the advertiser, and not on the network showing the commercial. Advertisements are shown on numerous outlets, and it would make no sense to impose a captioning obligation on each one of those outlets.

Even if the Commission imposes captioning requirements on national advertisements, however, local advertisements should be exempt from such a requirement. Local commercials generally have lower budgets. As the Notice acknowledges, "a captioning requirement [would] significantly raise the cost of certain advertising, especially local advertising that reaches small audiences which is currently inexpensive, and [would] prevent some entities from advertising."⁵¹

The cost of captioning a commercial is estimated at \$250 a minute.⁵² In smaller markets, this could far exceed the cost of creating a local ad. And even for large systems, this cost could represent an increase of anywhere from a quarter to a third of the entire production budget. Captioning costs alone may equal or exceed the cost that a cable operator would charge to purchase advertising time on its system.⁵³

⁵⁰ Exempt advertising should include traditional commercials as well as long form advertising such as infomercials. See Id.

⁵¹ Id.

⁵² Captioning Report at ¶47.

⁵³ The average rate for a 30 second spot in prime time is less than \$200. Paul Kagan Associates. Cable TV Advertising (May 31, 1996) at 6-7 (based on survey of 59 cable systems and interconnects in 42 television markets).

In many cases, a cable system will produce the local advertisement on behalf of clients. The system must quickly turn the advertising production around in order to air it. Adding captioning to the advertisement would impose significant delays to this process, as a cable system lacks the ability to itself caption the advertisement. Finding the outside expertise to caption in small and rural systems locations may well be impossible, even if time permitted.

The delays and costs occasioned by captioning may well make the difference between a client choosing to advertise on cable at all. A local advertiser has a choice between advertising on cable television or other media, such as radio or newspapers. These media have much lower production costs, and would not face delays in getting an advertisement to the market. Imposing a captioning requirement would both significantly raise the costs of these video productions, likely making advertising on television out of reach for these smaller operations, and would impose a significant competitive disadvantage on video outlets.

Finally, imposing captioning requirements on local advertising would change the value of local ad avails to cable systems. This, in turn, could alter the economics of the operator-network relationship.

For all these reasons, to avoid significantly changing the economics of local advertising to the detriment of cable systems and networks, the Commission should exempt these commercials from any mandatory captioning obligations.

V. THE COMMISSION SHOULD NOT ADOPT A TIMETABLE OR PERCENTAGE PHASE-IN FOR CAPTIONING LIBRARY PRODUCT

Many cable program networks provide previously produced ("library") materials. From all-documentary channels to channels consisting of classic movies or television series, the diverse cable universe provides viewers with access to a multiplicity of library programming. Much of this programming, especially that produced prior to the mid-1980's, has never been

captioned. Even programming that may have been captioned during its initial airing on the over-the-air networks or in movie theaters would require reformatting in order for a basic cable network to air it in a captioned format today.

Congress recognized the difficulty that imposing a mandatory captioning requirement on library product would present. It therefore established a statutory structure that differentiates between standards for newly produced programming and programming “first published or exhibited prior to the effective date” of the FCC’s captioning regulations.⁵⁴ With respect to the latter, video providers are expected to “maximize the accessibility” of this programming. As the legislative history explains: “[i]n general, the Committee does not intend that the requirement for captioning should result in previously produced programming not being aired due to the costs of captions.”⁵⁵ Congress also recognized “[t]hat economic or logistical difficulties make it unrealistic to caption all previously produced programming.”⁵⁶

The Notice correctly concludes that it would be

inappropriate to mandate captioning of nearly all library programming. First, based on the volume of existing uncaptioned programming, such a requirement could place a significant burden on the owners and providers of library programs created prior to closed captioning requirements. Further, rather than captioning their library programming, providers might elect to remove older, uncaptioned programming from their scheduled offerings rather than captioning such programs, thus reducing the amount and variety of programming options available to viewers.⁵⁷

⁵⁴ Section 713(b)(2).

⁵⁵ House Report at 114.

⁵⁶ Id.

⁵⁷ Notice at ¶58.

The FCC can satisfy Congress' mandate without imposing a required percentage of captioned library product or a deadline for captioning that product.⁵⁸

The economics of captioning a library product differ dramatically from that of new programming. A new pre-recorded program can be expected to have a multi-year life cycle, during which it gains exposure on a variety of distribution outlets. A library product, in many cases, has no such expectation. Distributors will have little or no economic incentive to caption programs that have little additional marketability.

A network that chooses to license the library product would bear the entire cost of both captioning and reformatting that work. These costs will act as a strong disincentive to any further airing of that work. Much of the library product has been purchased in years prior to any captioning requirements. The program costs for such product never contemplated additional captioning costs and this will unfairly penalize networks with a large percentage of library product.

In addition, captioning requirements would significantly raise the cost of establishing a new network because the lower cost of library product is the economic foundation on which many new services are established. Captioning requirements could make the difference between success and failure of new services.

⁵⁸ The Notice defines "library" programming as programming first published or exhibiting prior to the effective date of its rules. Notice ¶51. The rules should clarify that any captioning requirements that might be adopted apply only to such program if they are aired subsequent to the rules' effective date -- and not to all programming (including archival programming) sitting on library shelves. There is no requirement that programming that is not shown should be captioned.

Furthermore, the FCC should clarify that minor modifications to a "library" program that do not substantially change the programming (e.g., reformatting for cable, or adding interstitial material) do not modify its classification by changing it to a "new" program.

Imposing a captioning requirement also changes the economics of existing agreements for library material. Contracts entered into prior to the date of any new FCC captioning requirements do not reflect captioning costs in the license fees paid. For this reason, even if the FCC decides to impose a captioning requirement on library product, it should grandfather all contracts that were in existence on February 8, 1996. This action would be entirely consistent with the Act's provision that captioning should not be required if it would be "inconsistent" with contracts in effect on that date.⁵⁹

However, much library product is already captioned. And popular classic programs and movies that attract wide viewership have been and will continue to be captioned over time.⁶⁰ Market forces will ensure that more captioned material will replace programming published prior to the effective date of the rules. New product that contains captioning will naturally replace older, uncaptioned material.

Imposing mandatory captioning requirements on all library product, however, does not and would not "maximize the accessibility" of previously published video programming. Instead, it will lead to the loss of diverse programming for viewers, contrary to congressional intent.

⁵⁹ The Notice advances an unduly narrow interpretation of this provision. Notice at ¶88. The Notice expresses concern that a broad interpretation might exempt programs covered by long term contracts that have not yet been produced. But grandfathering existing contracts for programming already produced does not raise these same concerns. Instead, it would insure that programmers are not deprived of the benefit of the bargain that they made prior to the rules' adoption. It would avoid imposing expensive and operationally difficult obligations on program networks and producers alike.

⁶⁰ See Comments of the Motion Picture Association of America, MM Docket 95-176 at 12 (filed Mar. 15, 1996).

VI. THE FCC SHOULD ESTABLISH A SIMPLE PROCEDURE AND PROVIDE FLEXIBILITY IN DETERMINING WHETHER CAPTIONING CONSTITUTES AN “UNDUE BURDEN”

A. Factors For Determining Whether An “Undue Burden” Case Has Been Made

The ability to demonstrate on a case-by-case basis that captioning constitutes an “undue burden” is an important safeguard to ensure that captioning requirements do not lead to a loss of programming or have a detrimental impact on particular programs or networks.

Congress laid out four factors that the Commission should consider in determining whether the requirements to caption would constitute an “undue burden.” These include:

- (1) the nature and cost of the closed captions for the programming;
- (2) the impact on the operation of the provide or program owner;
- (3) the financial resources of the provider or program owner; and
- (4) the type of operations of the provider or program owner.⁶¹

The House Report also enumerates other factors that could be taken into account, including the “cost of captioning, considering the relative size of the market served or the audience share;... the cost of the captioning, considering whether the program is locally or regionally produced; ... the non-profit status of the provider; ... and the existence of alternative means of providing access to the hearing impaired, such as signing.”⁶² The Notice properly concludes that “[t]he statute seems to invite the Commission to consider other relevant factors besides those listed specifically in Section 713(e).”⁶³

The Commission need not identify in advance all the factors that might be relevant to determining whether an “undue burden” showing has been satisfied. Instead, it should grant

⁶¹ Section 713 (e).

⁶² House Report at 115.

⁶³ Notice at ¶91.

program owners, producers, and operators the flexibility to show why captioning is significantly burdensome in a particular case. These factors could be based on financial, operational, or technical reasons.

The Notice also appropriately recognizes that an “undue burden” showing differs from that established in the Americans with Disabilities Act (“ADA”). The legislative history makes clear that in considering exemptions, “the Commission should focus on the individual outlet and not the financial conditions of that outlet’s corporate parent, nor the resources of other business units within the parent’s corporate structure.”⁶⁴ As the Notice points out, this differs from the ADA standard, which looks to the overall financial structure of any parent corporation or entity.⁶⁵ The Notice is correct that the overall financial resources of the parent company or even other programs on a particular network should be irrelevant to the decision regarding whether captioning would present an undue burden for a particular program. Programming budgets are based on the economics of a particular program or the total programming line-up, not on the resources of related companies.

B. Procedures For Making An “Undue Burden” Showing

To avoid burdens on all parties, the Commission should adopt straightforward procedures for making an appropriate showing. In addition to the individualized special relief petition, the FCC should allow petitions of general applicability and should apply the ruling to all similarly situated entities. In establishing a body of rulings, parties would be able to avoid the expense of individually prosecuting petitions at the FCC. Moreover, the Commission should allow all

⁶⁴ Id. at 114- 15.

⁶⁵ Notice at ¶96 & n.186.

affected parties -- be they program owners, producers, providers, or syndicators -- to petition for special relief. Finally, the FCC should adopt expeditious timetables for resolving these showings.

VII. QUALITY STANDARDS ARE INAPPROPRIATE

The cable industry has operated with obligations to transmit captioning intact for several years.⁶⁶ This regulation has ensured that captioning that arrives at the cable headend is delivered to customers. Moreover, as programmers become more aware of captioning issues, it can be anticipated that reported problems with closed captioning will be reduced.⁶⁷ However, at this juncture, we agree with the Commission that regulations governing the non-technical quality of captioning (e.g., accuracy of transcription, punctuation, placement, identification of non-verbal sounds, pop-up or roll-up style, verbatim or edited for reading speed, and type font) should not be adopted.⁶⁸ We also agree that standards for spelling accuracy should not be imposed. While the quality of captioning is important to those viewing and providing the captioning, imposing standards at this early stage would hurt, rather than benefit, captioning efforts. The marketplace will help to ensure that programmers provide the most accurate captioning possible. However, with respect to real-time captioning, for example, the costs of imposing additional requirements will only put captioning out of reach for more program networks -- and force programmers into a needless round of additional undue burden showings.

⁶⁶ 47 C.F.R. §76.606.

⁶⁷ See Notice at ¶103 (describing reported problems with captions not synchronized with the video portion of the program, captions ending before the programs' end).

⁶⁸ Id. at ¶111.

We also agree with the Commission's tentative conclusion not to restrict the captioning methodology used to achieve the goal of maximizing available captioning.⁶⁹ Programmers should be able to employ the electronic newsroom ("ENR") captioning method. ENR is a cost-effective means of captioning for the cable networks that provide news and other studio-based live programming. It can be anticipated that these networks, many of whom have not up until now provided captioned material, will be able to significantly increase their captioning through ENR equipment in a relatively short period of time. If ENR were restricted (and if the Commission were to take an overly-narrow view of what constitutes acceptable captioning of a program), live captioning costs would be prohibitive for many cable program networks.

Moreover, by allowing programmers to experiment with different technologies for achieving captioning, the FCC will allow the market to develop to provide new and perhaps improved methods of captioning. This flexibility, particularly at this early stage of development of the captioning efforts of many cable networks, will allow programmers to explore different options to provide cost-effective captioning, and will let the marketplace -- rather than government regulation -- decide which is most appropriate for different types of program services.

VIII. RESPONSIBILITY FOR COMPLIANCE

The Notice proposes that responsibility for compliance with the closed captioning requirements should be placed on "video programming providers," which it defines as "[a]ll entities who provide video programming directly to a customer's home, regardless of the

⁶⁹ Id. at ¶121.

distribution technologies employed by such entities.”⁷⁰ As a practical matter, however, the Commission recognizes that “[c]aptioning at the production stage is often the most efficient manner to include closed captioning with video programming.”⁷¹ The Commission anticipates that video programming providers will incorporate the requirements into their contracts with “video producers and owners, regardless of which party has the obligation to comply with our rules.”

We agree with the FCC’s proposal. We would anticipate that these new rules would work in a manner similar to the children’s television commercial limits, in which operators obtain network programming that complies with the FCC’s rules. To ensure that operators are not faced with liability for programming over which they have no practical control, however, the Commission should make clear that operators may rely on certifications from programmers that they are in compliance with the rules.

The Commission has exclusive jurisdiction under Section 713.⁷² The rules should make clear that the FCC has exclusive authority to enforce the rules and should also provide that a finding of liability for violation of the captioning requirements does not constitute a violation of applicable law for purposes of compliance with local franchise provisions.⁷³

⁷⁰ Notice at ¶28.

⁷¹ Id. at ¶29.

⁷² Section 713(h) (“The Commission shall have exclusive jurisdiction with respect to any complaint under this section.”)

⁷³ See, e.g., Report and Order, 8 FCC Rcd. 5631, 5727-28 (1993) (rate regulation violation not subject to punitive action by a franchise authority).

Moreover, existing affiliation agreements do not incorporate any provisions regarding compliance with captioning rules. Renegotiating these contracts would impose significant burdens, both financially and operationally, on networks and operators. Accordingly, the Commission should grandfather existing contracts.

Furthermore, operators should not be forced to assume responsibility for captioning programming that is franchise- or legally-compelled. For example, the Commission in its Notice seeks comments on whether public, educational or governmental ("PEG") programming and leased access programming should be captioned.⁷⁴ The Cable Act denies an operator editorial control over access programming.⁷⁵ Accordingly, should the Commission determine that access programming is to be covered by its mandatory captioning requirements, the obligation to caption should be assigned to the access programmer, not the cable operator. Similarly, cable operators by law must transmit broadcast station signals intact.⁷⁶ The rules should exempt operators from responsibility for compliance with captioning requirements on the television stations it carries on its system.⁷⁷

⁷⁴ Id. at ¶74 - 75.

⁷⁵ 47 U.S.C. §531(e) (cable operator may not exercise any editorial control over any public, educational, or governmental use of channel capacity provided under this section); 47 U.S.C. §532((c)(2) (Operator shall not exercise editorial control over video programming provided pursuant to leased access provision).

⁷⁶ 17 U.S.C. §111 (c)(3).

⁷⁷ Similar rules apply in the children's television area. See Children's Television Programming, 68 R.R.2d 1615, 1620-21 (1991) (exempting operators from liability for access channels and broadcast stations).

IX. COMPLAINTS AND RECORDKEEPING

The Commission should adopt reasonable complaint procedures. Given the adoption of appropriate exemptions and phase-ins, the fact that a single program may not be captioned would not demonstrate a violation of the rules. The FCC should not institute a proceeding based on a filing of a customer complaint that merely alleges that a particular program (or programs) was not captioned.

The Commission instead should allow program networks to provide a certification of compliance that would be placed in cable operators' public inspection files . We do not believe, however, that the FCC should dictate the records that a program network would need to keep in order to provide back up for those certifications. Programmers should be permitted to maintain, in the normal course of business, whatever records they deem appropriate to demonstrate compliance with the rules.

CONCLUSION

For the foregoing reasons, NCTA urges the Commission to adopt reasonable timetables and appropriate exemptions from captioning requirements consistent with its Comments herein.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Daniel L. Brenner / dbb", is written over a horizontal line.

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